

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON**

KEVIN CLAY,

Plaintiff,

:

Case No. 3:08-cv-440

-vs-

Magistrate Judge Michael R. Merz

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MUFFLER MAN, INC.,,

Defendant.

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**DECISION AND ORDER**

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This case is before the Court on Defendant's Motion to Dismiss (Doc. No. 9).

Plaintiff filed the Complaint *pro se* in this action on December 1, 2008 without including the Notice of Right to Sue (Doc. No. 2). On the same day the Magistrate Judge recommended dismissal for lack of exhaustion of administrative remedies (Doc. No. 3). Plaintiff then filed the Notice of Right to Sue (Doc No. 4) and the Report was withdrawn (Doc. No. 5).

The Notice of Right to Sue was mailed on August 27, 2008, and plainly notified Plaintiff of his obligation to file suit within ninety days of receipt. The ninetieth day after August 27, 2008, was November 25, 2008, but the Complaint was not filed until six calendar days later on December 1, 2008.

In his Memorandum in Opposition, Plaintiff asserts that the ninetieth day would have been November 27, 2008. On that day the Court was closed for the Thanksgiving holiday. Plaintiff asserts, however, that the Court was also closed the next day, November 28, 2008, so that the first day on which he could have filed was December 1, 2008, the date on which he actually did file.

Defendant's Reply shows by the Affidavit of Mary Kay Budge, Dayton Division Manager,

that the Court was in fact open on November 28, 2008, so Plaintiff could in fact have filed on that day. Moreover, the ninetieth day after August 27, 2008, was not November 27<sup>th</sup>, but actually November 25<sup>th</sup>.

Plaintiff's Complaint is accordingly barred by the statute of limitations provided in 42 U.S.C. § 2000e-5(f). The Motion to Dismiss is granted and the Clerk will enter judgment dismissing the Complaint with prejudice.

March 12, 2009.

s/ **Michael R. Merz**  
United States Magistrate Judge